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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/923,469	08/06/2001	Jeffrey Todd Tuller	01-9343	1536

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EXAMINER

MATHEW, FENN C

ART UNIT	PAPER NUMBER
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3764

DATE MAILED: 09/29/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

**Office Action Summary**

Application No.

09/923,469

Applicant(s)

TULLER ET AL.

Examiner

Fenn Mathew

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 19 February 2003.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-34 is/are pending in the application.
- 4a) Of the above claim(s) 6-8, 12-14, 16, 20, 21, 31, 32 and 34 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-5, 9-11, 15, 17-19, 22-30 and 33 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on \_\_\_\_\_ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

**Priority under 35 U.S.C. §§ 119 and 120**

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

**Attachment(s)**

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449) Paper No(s) 5.
- 4) ☐ Interview Summary (PTO-413) Paper No(s). \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other:

## **DETAILED ACTION**

### ***Election/Restrictions***

1. Applicant's election with traverse of the election requirement in Paper No. 8 is acknowledged. The traversal is on the ground(s) that no serious burden is created. This is not found persuasive because different kinds of joint are not considered obvious modifications of one another unless clearly stated on the record by the applicant, and are not restricted to the abdominal exercise art. Furthermore, the use of padded rollers indicates a wholly different type of lower member as disclosed in all other figures. The use of elastic bands (fig. 10) is also completely separate from other embodiments.

The requirement is still deemed proper and is therefore made FINAL. As such, claims 1-5, 9-11, 15, 17-19, 22-30 and 33 have been examined.

### ***Claim Objections***

2. Claims 29-30 objected to because of the following informalities: In claims 29-30, the terms upper attachment means and lower attachment means lack positive antecedent basis. Appropriate correction is required.

### ***Claim Rejections - 35 USC § 102***

3. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

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(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

4. Claims 1-2, 4-5, 9, 11, 15, 18, 27-28, 30, and 33 are rejected under 35

U.S.C. 102(e) as being anticipated by Diamond, Jr. (U.S. Patent No. 6,231,487).

Referring to claim 1, Diamond discloses a device comprising an upper member (16a, 16b) and a lower member (18), the upper and lower member comprising generally extending members, a semi-rigid member (14) providing a range of bending force, the semi-rigid member coupled to the upper member and lower member, whereby feedback is provided during exercise. (Column 6, lines 64-67, resistance is a form of feedback).

5. Referring to claim 2, Diamond discloses a device wherein the generally extending members of the upper member separate by a range from 0-180 degrees (see fig. 2), the upper member comprises an engagement member, and the semi-rigid member is coupled to the lower member by a pivoting joint (27b).

6. Referring to claim 4, Diamond discloses the semi-rigid member detachably coupled to the upper member and the detachably coupled to the pivoting joint. (Inherently pins can be removed).

7. Referring to claim 5, Diamond discloses the device wherein the semi-rigid member is coupled to the upper member by upper attachment means, and the lower member by lower attachment means (20b).

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8. Referring to claim 9, Diamond discloses the generally extending members of the upper member comprising rotatable handgrips (col. 5, lines 5-7).

9. Referring to claim 11, Diamond discloses the semi-rigid member detachably attachable to the upper attachment means and the lower attachment means.

10. Referring to claim 15, Diamond discloses the lower attachment means comprising a pivot joint providing a pivot motion along the axis of the semi-rigid member.

11. Referring to claim 18, Diamond discloses the semi-rigid member detachably attachable to the upper and lower attachment means.

12. Referring to claim 27, Diamond discloses an exercise machine comprising an upper member (106b) and a lower member (108), the upper and lower members comprising generally extending members, and a plurality of semi-rigid members (104a, 104b, 104c) providing a range of bending force, the plurality of semi-rigid members coupled to the upper member and lower member, whereby feedback is provided during exercise.

13. Referring to claim 28, Diamond discloses the generally extending members of the upper member being curved.

14. Referring to claim 30, Diamond discloses the semi-rigid member detachably attachable to the upper member and lower member.

15. Referring to claim 33, Diamond discloses an exercise device comprising means for engaging an upper body portion (16a, 16b), means for engaging a lower body portion (18), semi-rigid means (14) for flexibly resisting compression, the semi-rigid

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means coupled to the upper engagement means and lower engagement means, and providing feedback during exercise.

16. Claims 1-3, 5, 9-10, 15, 17, 19, and 23-25 rejected under 35 U.S.C. 102(b) as being anticipated by Abdo (U.S. Patent No. 6,022,303). Referring to claim 1, Abdo discloses an exercise device comprising an upper member (23) and a lower member (25) comprising generally extending members, a semi-rigid member (22) providing a range of bending force (see figs. 7-9), the semi-rigid member coupled to the upper and lower member, whereby feedback is provided when exercise is performed.

17. Referring to claim 2, Abdo discloses the device wherein the generally extending members of the upper member separate by a range from 0-180 degrees, the upper member further comprising an engagement member (38), and the semi-rigid member coupled to the lower member by a pivoting joint (42).

18. Referring to claim 3, Abdo discloses the semi-rigid member securely coupled to the upper member and the semi-rigid member securely coupled to the pivoting joint.

19. Referring to claim 5, Abdo discloses the semi-rigid member coupled to the upper member by upper attachment means (38) and to the lower member by lower attachment means (24).

20. Referring to claim 9, Abdo discloses the upper member including rotatable handgrips.

21. Referring to claim 10, Abdo discloses the semi-rigid member securely coupled to upper and lower attachment means.

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22. Referring to claim 15, Abdo discloses the lower attachment means comprising a lower attachment means comprising a pivot joint (42).

23. Referring to claim 17, Abdo discloses the semi-rigid member securely coupled to the upper attachment means and lower attachment means.

24. Referring to claim 19, Abdo discloses an exercise machine wherein the lower attachment means comprises a pivot joint (ball socket joint) providing a combination of a pivot joint motion along the axis of the semi-rigid member and a rotational pivoting motion.

25. Referring to claim 23, Abdo discloses the lower attachment means comprising a ball joint having a ball joint assembly, a ball joint cover (46), the semi-rigid member coupled to the ball joint via the opening of the ball joint assembly and the ball joint allowing for a side to side as well as a front to back motion of the semi-rigid member.

26. Referring to claim 24, Abdo discloses the generally extending members of the upper member being substantially parallel to the lower member.

27. Referring to claim 25, Abdo discloses the semi-rigid member securably attachable to the upper attachment means and the lower attachment means.

### ***Claim Rejections - 35 USC § 103***

28. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

29. Claim 29 is rejected under 35 U.S.C. 103(a) as being unpatentable over Diamond. Diamond discloses the claimed invention except for having the semi-rigid member securely coupled to the upper attachment means and lower attachment means. It would have been obvious to one having ordinary skill in the art at the time of invention to have the semi-rigid member securely coupled to the upper attachment means and lower attachment means since it has been held that forming in one piece an article which has formerly been formed in two pieces and put together involves only routine skill in the art. *Howard v. Detroit Stove Works*, 150 U.S. 164 (1893). Furthermore, applicant has stated no inherent or apparent advantage, and no undesired or unexpected result would arise if the disclosed configuration were used. Therefore it would have been well within the knowledge of one with ordinary skill in the art at the time of invention to have the upper and lower attachment means securely attached to the semi-rigid member.

30. Claims 22 and 26 are rejected under 35 U.S.C. 103(a) as being unpatentable over Abdo. Abdo discloses the claimed invention except for having the upper and lower attachment members detachably attached to the semi-rigid member. It would have been obvious to one having ordinary skill in the art at the time of invention to have the upper and lower attachment members detachably attached to the semi-rigid member, since it has been held that constructing a formerly integral structure in various elements involves only routine skill in the art. *Nerwin v. Erlichman*, 168 USPQ 177, 179.

### ***Conclusion***



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31. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

Zarillo et al. U.S. Patent No. 5,957,820

Huang U.S. Patent No. 5,695,436

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Fenn Mathew whose telephone number is (703) 305-2846. The examiner can normally be reached on Monday - Friday 9:00am - 5:30pm.

The fax phone numbers for the organization where this application or proceeding is assigned are (703) 872-9302 for regular communications and (703) 872-9303 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-1148.



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August 4, 2003